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Supreme Court, U.S.
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No. 92-1915

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

YOUELL AND COMPANIES,

Petitioners,

VS.

GETTY OIL COMPANY AND
TEXACO INC.,

Respondents.

On Writ of Certiorari to the Texas Supreme Court

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners believe that their Petition adequately states grounds for granting a Writ of Certiorari. Nevertheless, they submit this Reply to Respondent's Opposition to Petition for Writ of Certiorari to address some issues raised by Respondent.

I. Petitioners Did Not Misstate The Texas Supreme Court's Ruling.

Respondent incorrectly states that Petitioners attempted to mislead this Court by implying that the Texas Supreme Court granted final summary judgment for Respondent and disposed of the case below. Petitioners quoted the Texas Supreme Court's objectionable ruling in the Statement of the Case. Petition, at pp. 3-4. As Petitioners explained in their Petition, the Texas Supreme Court did not expressly grant summary judgment for Respondent, but rather *effectively* granted partial summary judgment. It resolved a key issue which was, in fact, the subject of Respondent's motion for partial summary judgment. *See* R. 785-795. Respondent's motion, however, was not on appeal and Petitioners' responses were not in the appellate record. Thus, the ruling of the Texas Supreme Court, fairly interpreted, removes a key issue from contention and amounts to grant of a motion for partial summary judgment for Respondent without any opportunity for Petitioners to be heard.

Petitioners' point is simply that this Court must look to the actual *effect* of the Texas Supreme Court's ruling, and to the fact that it has excluded Petitioners from any opportunity to be heard on a key issue.

The ruling of the Texas Supreme Court has become the law of the case. Petitioners have been permanently deprived

of their opportunity to raise their objections in a meaningful forum. The trial court does not have the authority to change the Texas Supreme Court's ruling, and the effect of the unconstitutional ruling will color the rest of the trial court proceedings on remand, spreading the effect of this deprivation of rights. That is the sense in which the Texas Supreme Court "effectively" granted Respondent a partial summary judgment, and that is what the Petition states.

II. The Requirement Of Notice And An Opportunity To Be Heard Applies To Factual And Legal Arguments.

Respondent attempts to distinguish Petitioners' cases on due process by suggesting that due process requires only the opportunity to present factual arguments, and not the opportunity to present legal arguments. Respondent cannot, however, avoid clear statements of the law to the effect that the opportunity to present both factual and legal arguments is protected. This was stated clearly in *Powell v. U.S.*, 849 F.2d 1576, 1579-82 (5th Cir. 1988); "the district court must give proper notice to insure that the non-moving party had the opportunity to make every possible *factual and legal* argument." (Emphasis added). *Accord Williams v. City of St. Louis*, 783 F.2d 114, 116 n.1 (8th Cir. 1986) ("The [defendant] suggests that because the contested ordinance was before the court, 'the only opportunity conceivably lost to plaintiffs was the presentation of legal arguments. . . .' This is precisely the reason that we find the grant of summary judgment inappropriate. As we have already noted, there are no factual issues to resolve here. The denial of an opportunity to make legal arguments is exactly what rule 56 is intended to prevent.")

Petitioners are entitled to join issue against the grant of a summary judgment ruling for Respondent. Due process

analysis focuses on the opportunity to be heard, without reaching, at this stage of the analysis, the merits of the defenses that might have been interposed. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988). While many cases focus on the opportunity to develop facts, the federal due process standard requires that notice of the *legal* issue, and the opportunity to join the debate on that legal issue, must be preserved.

Respondent also appears to miss the point that there is a vast difference between submitting that there are no material facts on a motion for summary judgment, and admitting that there are no material facts for purposes of a counter-motion. *See Prepo Corp. v. Pressure Can Corp.*, 234 F.2d 700, 703 (7th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).[1]

In this context, Respondent stated that its responses to Petitioners' motion for summary judgment below *were* in the appellate record.[2] That may be, but the relevant point is that Petitioners' *responses* to Respondent's motion were *not* in the record. The Texas Supreme Court did not have Petitioners' arguments against Respondent's position before it in any form. A court may be justified in ruling on a motion previously

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[1] Respondent misconstrues *Prepo* and *Mingus Constructors*. Petitioners did not contend that those cases were relevant because of the finality of the judgments there (as suggested by Respondent). *Prepo* and *Mingus Constructors* demonstrate, rather, that the absence of material facts under movant's proposed legal interpretations may not be equated with an absence of material facts under other legal interpretations. This point emphasizes the difference between ruling in favor of a movant and ruling in favor of the non-movant in a system of alternative pleading.

[2] Brief in Opposition, at 13.

denied *if* it has access to the relevant pleadings and arguments that framed the issues and made the motion ripe for decision. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283-84 (5th Cir. 1993). The Texas Supreme Court simply did not have before it any of the documents necessary to a full consideration of the issue it decided, and that denied Petitioners their constitutional right to due process.

Respondent attempts to minimize the impact of due process in summary judgment proceedings. The summary judgment procedure is a common tool for efficient disposition of civil cases throughout the United States; it is therefore vital that this Court preserve due process in that procedure.

III. Texas Law Makes The Opportunity To Present Surrounding Factual Circumstances As Well *As Legal Arguments* Relevant.

Respondent suggests that nothing Petitioners could have raised could impair the Texas Supreme Court's authority to rule as it has done. First, the Texas Supreme Court has no authority to render decisions without meeting basic due process requirements. Contrary to Respondent's contentions, the ability to raise *legal* arguments is a protected right.

Second, if Respondent means that any response by Petitioners would be doomed to failure, there is simply no way to evaluate that position. That is the point of the Petition. The Texas Supreme Court could not have known whether Petitioners' responses might have made a difference because they were not in the record and Petitioners had no opportunity to present their arguments. Further, Texas law requires a court to consider the "surrounding circumstances" when seeking to interpret the face of a contract. This does not mean that the court may reach all issues possibly bearing on interpreta-

tion, such as parol evidence and intent; but simply means that the "surrounding circumstances," such as industry custom and practice, may be considered as a tool to interpret the contract. *E.g. KMI Continental Offshore Production Co. v. ACF Petroleum Co.*, 746 S.W.2d 238, 241 (Tex. App.—Houston [1st Dist.] 1987, writ denied); *Airmark, Inc. v. Advanced Systems, Inc.*, 715 F.2d 229, 230 n.1 (5th Cir. 1983) (Texas law).[3] Petitioners are entitled to the opportunity to assert all matters that are relevant under Texas law, and the opportunity sought is real, not theoretical.

IV. Conclusion

The ruling of the Texas Supreme Court, while not an express grant of summary judgment in favor of Respondent, does in fact grant a ruling sought by Respondent in its motion for partial summary judgment. Further, it disposes of an important issue in the case adverse to Petitioners, and will result in further prejudice to Petitioners in the trial court below upon remand unless addressed at this stage of the proceedings.

Respectfully submitted,

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[3] Respondent also attempts to accord the verdict from the prior mini-trial in this case some significance in supporting the Texas Supreme Court's ruling. A verdict upon which no judgment has been entered does not have any effect, so, despite Respondent's suggestion, Petitioners' statement that "it has never been determined that a contract exists or that it applies to the underlying circumstances" is correct. Respondent conceded this point before the Texas Supreme Court.

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